

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: CATHODE RAY TUBE (CRT)) MDL No. 1917
ANTITRUST LITIGATION) Case No. CV 07-5944 SC
ORDER GRANTING SHARP'S MOTION
FOR LEAVE TO AMEND

This Document Relates to:
Sharp Elecs. Corp. v. Hitachi,
Ltd., No. 13-cv-01173;

I. INTRODUCTION

Now before the Court is Plaintiffs Sharp Corporation and Sharp Electronics Manufacturing Company of America's (collectively, "Sharp") motion for leave to file an amended complaint. ECF No. 2520 ("Mot.") (filed under seal). The Toshiba Defendants ("Toshiba") oppose the motion. ECF Nos. 2538 ("Opp'n"), 2547 ("Reply").¹ Per Civil Local Rule 7-1(b), the Court finds the

¹ Toshiba also asks for leave to file a surreply, ECF No. 2553, which Sharp opposes, ECF No. 2563. The Court GRANTS Toshiba's motion, but does not find either party's surreply brief dispositive.

1 motion suitable for decision without oral argument and GRANTS it,
2 as explained below.

3
4 **II. BACKGROUND**

5 Sharp's Complaint and First Amended Complaint alleged various
6 antitrust and unfair competition claims against Toshiba, seeking
7 damages based on both Sharp's purchases from Toshiba and Toshiba's
8 joint and several liability as a co-conspirator defendant.

9 Toshiba's sales to Sharp represent a fairly large sum, but the
10 amount of the other defendants and co-conspirators' sales to Sharp
11 is far larger. Toshiba moved to dismiss Sharp's claims under Rule
12 12(b)(3) in October 2013,² and before the Court considered the
13 motion, the Supreme Court clarified that motions to dismiss based
14 on forum-selection clauses -- like Toshiba's motion to dismiss --
15 were to be evaluated not under Rule 12(b)(3) but under forum non
16 conveniens doctrine. Atl. Marine Const. Co., Inc. v. U.S. Dist.
17 Ct. for the W. Dist. of Tex., 134 S. Ct. 568, 580 (2013). After
18 the parties discussed that doctrinal change, the Court evaluated
19 Toshiba's motion to dismiss.

20 That motion was based on an agreement that Sharp and Toshiba's
21 Japanese parent companies had entered: the Basic Transaction
22 Agreement ("BTA"). See MTD at 1. The Court held that the BTA
23 bound Sharp and Toshiba so far as it concerned cathode ray tube
24 ("CRT") purchases they made from each other -- the commerce that
25 forms the basis of this MDL -- and dismissed with prejudice Sharp's
26 claims against Toshiba under the BTA's forum-selection clause,
27 which stated that litigation related to purchase orders under the

28

² ECF Nos. 2000 ("MTD"), 2195 ("MTD Opp'n"), 2229 ("MTD Reply").

1 BTA was to be conducted in Japan. ECF No. 2435 ("Mar. 13 Order").

2 Sharp does not challenge the Court's dismissal of its claims
3 based on Toshiba's sales to Sharp. Rather, Sharp's present motion
4 to amend is based on the fact that neither Sharp, Toshiba, nor the
5 Court stated whether Sharp's claims against Toshiba based on joint
6 and several liability were to remain in the case. The March 3
7 Order dismissed Sharp's claims, though it only discussed dismissal
8 relative to the BTA, so the question of joint and several liability
9 never arose. Sharp asks for leave to amend its complaint to
10 specify that it is only bringing claims for joint and several
11 liability against Toshiba. Sharp contends that these claims are
12 not covered by the BTA and could not have been dismissed per the
13 forum-selection clause, which was the only matter the parties
14 briefed. Toshiba opposes the motion, arguing that even though
15 neither it nor Sharp addressed joint and several liability, all
16 claims against it (including those for joint and several liability)
17 must have been dismissed in the Court's March 13 Order.

18
19 **III. LEGAL STANDARD**

20 After a party has amended a pleading once as a matter of
21 course, it may only amend further if it obtains leave of the court.
22 Fed. R. Civ. P. 15(a).³ Rule 15 advises the court that "leave

23 ³ Sharp notes that before a dismissal is made final under Rule
24 54(b), Rule 15 is the appropriate standard for governing leave to
25 amend, even when a dismissal was with prejudice. The Court agrees,
26 because the Court has not certified any judgments under Rule 54.
27 Toshiba procedurally objects on other grounds, also contending that
28 Sharp's motion is a disguised motion for reconsideration, but the
Court does not agree. As discussed in this Order, the posture of
the case suggests that a nuanced consideration under Rule 15 is
appropriate, and the Court declines to interpret Sharp's Rule 15
motion as something other than what both parties ultimately agree
that it is.

1 shall be freely given when justice so requires," and the Ninth
2 Circuit instructs that this policy is "to be applied with extreme
3 liberality." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048,
4 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan,
5 Inc., 244 F.3d 708, 712 (9th Cir. 2001) (additional quotations
6 omitted)). The Supreme Court offers additional guidance to
7 district courts in deciding whether to grant leave to amend:

8 In the absence of any apparent or declared reason --
9 such as undue delay, bad faith or dilatory motive on the
10 part of the movant, repeated failure to cure
11 deficiencies by amendments previously allowed, undue
12 prejudice to the opposing party by virtue of allowance
13 of the amendment, futility of amendment, etc. -- the
14 leave sought should, as the rules require, be "freely
15 given."

13 Foman v. Davis, 371 U.S. 178, 182 (1962). Consideration of
14 prejudice to the opposing party carries the greatest weight, but
15 absent that or a strong showing of any remaining Foman factor, Rule
16 15(a) carries a presumption in favor of granting leave to amend.
17 Eminence Capital, 316 F.3d at 1052.

18 19 **IV. DISCUSSION**

20 Sharp argues that though the dismissal was with prejudice, the
21 Court should grant it leave to amend under Rule 15, primarily
22 because neither party briefed the issue of joint and several
23 liability, and granting leave to amend on that issue would serve
24 substantial justice. See Reply at 11-14. From there the parties
25 argue over who should have raised the issue, based on who should
26 have remembered its import from separate but similar disputes
27 regarding arbitration clauses. Both parties are acquainted with
28 older motions in this case, in which the parties (Toshiba, in one

1 such dispute) argued over whether to separate conspiracy-related
2 joint and several liability claims from direct-purchaser claims in
3 motions to compel arbitration.

4 This dispute appears to hinge on an assessment of whether
5 Toshiba should have pointed out the missing issue to Sharp, as
6 opposed to Toshiba's enjoying the benefit of Sharp's omission and
7 then claiming waiver. The Court declines to entertain that line of
8 argument, finding that the liberal standard of Rule 15, subject to
9 the Foman factors, governs the Court's resolution of this matter.

10 Accordingly, the question for the present motion is whether
11 Sharp is entitled to amend its complaint per the Foman factors.
12 Toshiba argues that Sharp's proposed amendment is futile, either
13 because the BTA committed the joint and several claims to the
14 jurisdiction of the Osaka District Court, or because the forum non
15 conveniens doctrine would render the claim futile independently of
16 the BTA.

17 **A. The Foman Factors**

18 Toshiba's brief appears to contest only the futility factor of
19 Foman. As a threshold matter, the Court agrees that the other
20 Foman factors are not at issue. First, Toshiba's long involvement
21 in this litigation does not raise questions of prejudice,
22 especially since Sharp's proposed amendment does not raise novel
23 issues in this case. Second, the Court does not find that Sharp's
24 prompt Rule 15 motion evinces bad faith or undue delay. Finally,
25 Sharp's prior amendments did not concern this particular issue, so
26 this is not a matter of Sharp repeatedly failing to cure a stated
27 deficiency. Accordingly, the Court considers only whether Toshiba
28 has established that Sharp's proposed amendment would be futile.

1 The Court finds that it would not be.

2 Preliminarily, the Court finds it irrelevant that, as Toshiba
3 states, Sharp's proposed amendment "would not add any new facts or
4 circumstances." Opp'n at 11-12. Proper amendments do not need to
5 add new factual allegations. A proper amendment may also cure a
6 defect in order to present a valid claim, thereby avoiding
7 futility.

8 **i. Futility - BTA Interpretation**

9 As the Court found in its March 13 Order, the BTA governs CRT-
10 related transactions between Sharp and Toshiba, even those
11 conducted by these subsidiary entities through individual
12 agreements and purchase orders governed by the BTA's terms. Mar.
13 13 Order at 6-8. Toshiba contends, however, that the BTA's
14 "Resolution of Doubt or Disputes" clause, read alongside the forum-
15 selection clause, requires joint and several liability claims
16 between Sharp and Toshiba to be litigated in Japan as well -- even
17 when they are not necessarily related to direct Sharp-Toshiba
18 commerce. Opp'n at 13-15. The Court finds Toshiba's
19 interpretation of the BTA incorrect on these points.

20 The "Resolution of Doubt or Disputes" clause, Article 21.1 of
21 the BTA, states, "[w]hen there are disputes or doubts that arise in
22 relation to this Agreement or individual Agreement, or when there
23 are unsolved items in this Agreement or individual Agreement,
24 resolutions shall be made between [Sharp and Toshiba] in good
25 faith." ECF No. 2000, Ex. 3 ("BTA") (filed under seal). The
26 forum-selection clause, Article 21.2 of the BTA, states, "[i]n
27 terms of litigation related to this Agreement or the individual
28 Agreement, the Osaka District Court shall be the court of competent

jurisdiction." BTA Art. 21.2.

Toshiba contends that a properly alleged joint and several liability claim based on conspiracy-related activity concerning other parties would violate Article 1.1 of the BTA, which requires the parties to "set their foundation on mutual trust and respect for mutual benefits." According to Toshiba, a conspiracy among it and other defendants that resulted in Sharp's paying higher prices would be a breach of this mutual trust and respect. Opp'n at 13-14. Further, Toshiba argues, if there are any doubts concerning how far, exactly, the BTA extends in cases like this, those doubts are to be resolved in the Osaka District Court pursuant to Articles 21.1 and 21.2 Id. at 14-15.

The Court is not convinced by this overbroad interpretation of the BTA. As a matter of contract interpretation involving a forum-selection clause, the Court's task is, first, to decide the clause's scope and applicability, and, second, to determine whether the clause applies to the behavior at issue. See Peterson v. Boeing Co., 715 F.3d 276, 280 (9th Cir. 2013) (holding that enforceability and interpretation of forum-selection clauses is an issue of federal law); Robeson v. Twin Rivers Unified Sch. Dist., No. 2:14-2 WBS KJN, 2014 WL 1392922, at *1-2 (E.D. Cal. Apr. 9, 2014) (applying that principle).⁴

Further, the Court finds that the BTA's plain meaning involves relations between Sharp, Toshiba, their parents, and their

⁴ Toshiba cites a case concerning questions of arbitrability, Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983), but that case is inapposite because the law and policy of arbitration is not identical to that concerning a court's interpretation of a forum-selection clause outside the arbitration context.

1 subsidiaries, so far as they concern the manufacture and supply of
2 CRTs. The resolution of doubt or disputes arising in relation to
3 the BTA or individual agreements (e.g., purchase orders) that are
4 subject to the BTA's terms is a matter the parties reserved for the
5 Osaka District Court. See Mar. 13 Order at 11-14. However, the
6 Court does not find that the BTA's Resolution of Doubt or Disputes
7 clause renders claims for joint and several liability -- unrelated
8 to the BTA or its individual agreements themselves -- similarly
9 subject to the forum-selection clause. As Sharp correctly notes,
10 under the plain meaning of the term "related to" in that clause,
11 the claims "must involve the [agreement] itself to trigger the
12 clause." Reply at 6 (quoting Coal. for ICANN Transparency Inc. v.
13 Verisign, Inc., 452 F. Supp. 2d 924, 921-32 (N.D. Cal. 2006)). The
14 BTA sends certain disputes and doubts to the Osaka District Court,
15 but those disputes and doubts must at least be related to the
16 Sharp-Toshiba transactions the BTA governs. Any potential
17 conspiracy-related joint and several liability Toshiba may have in
18 relation to other agreements is distinct in scope.

19 The Court therefore finds Toshiba's interpretation of the BTA
20 too broad and vague to be acceptable in these circumstances. The
21 BTA does not render Sharp's claims against Toshiba for joint and
22 several liability subject to dismissal under the forum-selection
23 clause, so amendment to clarify Sharp's claims against Toshiba
24 would not be futile on that ground.

25 **ii. Futility - Forum Non Conveniens**

26 Toshiba also argues that, separately from issues of the BTA's
27 scope, Sharp's proposed amendment would be futile because the
28 doctrine of forum non conveniens would compel dismissal of Sharp's

1 claims for joint and several liability. On this issue, Toshiba
2 points to the March 13 Order's discussions of the suitability of
3 the Osaka District Court, but the Court notes as a preliminary
4 matter that the March 13 Order's discussion is not entirely
5 apposite. It concerned a forum-selection clause, under which the
6 parties specifically contracted to commit certain issues to a
7 different court. Although a motion to dismiss that applies a
8 forum-selection clause is to be analyzed within the rubric of forum
9 non conveniens doctrine, Atl. Marine, 134 S. Ct. at 580, dismissal
10 under forum non conveniens when a forum-selection clause is not
11 involved requires slightly different balancing inquiries.

12 "A party moving to dismiss on grounds of forum non conveniens
13 must show two things: (1) the existence of an adequate alternative
14 forum, and (2) that the balance of private and public interest
15 factors favors dismissal." Lockman Found. v. Evangelical Alliance
16 Mission, 930 F.2d 764, 767 (9th Cir. 1991).

17 The Ninth Circuit has stated that "while a U.S. citizen has no
18 absolute right to sue in a U.S. court, great deference is due
19 plaintiffs because a showing of convenience by a party who has sued
20 in his home forum will usually outweigh the inconvenience the
21 defendant may have shown." Contact Lumber Co. v. P.T. Moges
22 Shipping Co., Ltd., 918 F.2d 1446, 1449 (9th Cir. 1990).
23 Nonetheless, "[a] citizen's forum choice should not be given
24 dispositive weight" Piper Aircraft Co. v. Reyno, 454 U.S.
25 235, 255 n.23 (1981). "[I]f the balance of conveniences suggests
26 that trial in the chosen forum would be unnecessarily burdensome
27 for the defendant or the court, dismissal is proper." Id.

28 Even though the Court found dismissal under the forum-

1 selection clause proper, the Court does not find that the doctrine
2 of forum non conveniens applies here to render Sharp's proposed
3 amendment futile.

4 **a. Adequate Alternative Forum**

5 First, though there is an adequate alternative forum, the
6 Ninth Circuit and Supreme Court have instructed district courts to
7 give substantial (though not dispositive) deference to a
8 plaintiff's choice of forum. Piper Aircraft, 454 U.S. at 255 n.23;
9 Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1335 (9th Cir. 1984).
10 The most important consideration under the circumstances is whether
11 the balance of conveniences suggests that a trial on the issue of
12 joint and several liability in this Court would be unnecessarily
13 burdensome for Toshiba or the Court. Piper Aircraft, 454 U.S. at
14 256 n.23. The Court finds that this factor favors Sharp.

15 **b. Private Interest Factors**

16 Second, the Court finds that the private interest factors do
17 not suggest that Toshiba would be unacceptably inconvenienced by
18 dealing with the issue of Sharp's joint and several liability
19 claims in this Court. "Private interest factors include: ease of
20 access to sources of proof; compulsory process to obtain the
21 attendance of hostile witnesses, and the cost of transporting
22 friendly witnesses; and other problems that interfere with an
23 expeditious trial." Contact Lumber, 918 F.2d at 1451; see also
24 Nebenzahl v. Credit Suisse, 705 F.2d 1139, 1140 (9th Cir. 1983).

25 Toshiba argues that most of its witnesses are located in Japan
26 and that only the Osaka District Court can hear disputes between
27 Sharp and Toshiba. Opp'n at 14-17. The Court finds that this
28 factor does not favor Toshiba. Discovery has proceeded in this MDL

1 with relative ease, with Toshiba having already presented numerous
2 witnesses for deposition. It is possible that Toshiba could be
3 inconvenienced by producing more witnesses, but the Court does not
4 find this an overly burdensome task for this defendant.

5 The Court also finds that while the parties committed specific
6 disputes to the Osaka District Court via the BTA, the issue of
7 Toshiba's potential joint and several liability is distinct from
8 the issues the parties agreed would be heard abroad. The Court
9 does not find that honoring the parties' agreement on certain
10 limited disputes would splinter this case. This is particularly
11 true here because the issue of joint and several liability seems
12 uniquely well-suited to resolution before this Court, due to the
13 long involvement of nearly every relevant party and the fact that
14 issues of Toshiba's joint and several liability were not
15 specifically committed to a foreign court. Cf. Lockman, 930 F.2d
16 at 770 (finding that the policy favoring an expeditious trial
17 merited a conclusion that the foreign jurisdiction was best, since
18 that jurisdiction was the only forum where the entire case could be
19 tried); Contact Lumber, 918 F.2d at 1452 (finding similarly).

20 Granted, the fact that Toshiba would be defending its case in
21 two separate jurisdictions does suggest some inconvenience to
22 Toshiba. Still, the Court does not find this inconvenience
23 compelling in this case because Toshiba specifically contracted to
24 have certain claims heard in a foreign court, even while it has
25 participated in this litigation for years, with discovery nearing a
26 close and other deadlines coming expeditiously close. Moreover,
27 this inconvenience does not seem unacceptably burdensome for a
28 multinational corporation like Toshiba.

1 The Court therefore finds that the private interest factors
2 weigh in favor of rejecting Toshiba's argument on futility.

3 **c. Public Interest Factors**

4 Finally, the Court finds that the public interest factors
5 merit retaining the issue of Toshiba's joint and several liability.
6 "Public interest factors encompass court congestion, the local
7 interest in resolving the controversy, and the preference for
8 having a forum apply a law with which it is familiar." Contact
9 Lumber, 918 F.2d at 1452; see also Nebenzahl, 705 F.2d at 1140.
10 Toshiba contends that by finding Sharp's proposed amendment futile
11 and committing the dispute to the Osaka District Court, the Court
12 would further the goals of judicial efficiency and economy by
13 ensuring that all of Sharp's claims would be heard in one forum.
14 Opp'n at 17. The Court is not convinced. This litigation has
15 proceeded before the undersigned for years, with the Court and the
16 Special Master now being well acquainted with the parties and
17 issues in this case. The Court's calendar on this case is well
18 advanced. Moreover, the parties' contractual resolution of certain
19 jurisdictional matters aside, this forum has a strong interest in
20 resolving this case. See Carijano v. Occidental Petroleum Corp.,
21 643 F.3d 1216, 1232 (9th Cir. 2011). Sharp's allegations regarding
22 joint and several liability concern a worldwide conspiracy to fix
23 prices in the United States. That is a significant factor in favor
24 of keeping this issue in this forum.

25 Accordingly, the Court finds that the public interest factors
26 weigh in favor of rejecting Toshiba's argument on futility.

27 ///

28 ///

iii. Conclusion as to Rule 15

The Court finds that Sharp's motion, considered under the extreme liberality of Rule 15, warrants permitting Sharp to file its amended complaint. The parties could have resolved some of these issues in a more straightforward, timely way, but nevertheless, Sharp has sufficiently shown that it is entitled to amend its pleadings, and Toshiba has failed to show that such an amendment would be either procedurally improper or substantively futile.

V. CONCLUSION

As explained above, the Court GRANTS the Sharp Plaintiffs' motion for leave to amend their complaint.

IT IS SO ORDERED.

Dated: June 9, 2014

Sincerely,

UNITED STATES DISTRICT JUDGE